No. 02-1290

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
AND ARTHUR WAH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Miscellaneous: Page

In the Supreme Court of the United States

No. 02-1290

UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
AND ARTHUR WAH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents concede both that Congress did not intend to create a cause of action under the antitrust laws against the United States, Resp. Br. 8-9, and that the Postal Service "must be viewed as part of the federal government," *id.* at 17. Those two principles compel the conclusion that respondents lack a cause of action against the Postal Service under the antitrust laws. Congress's creation of the Postal Service as part of the Executive Branch carries forward this Nation's long history of treating postal service as a "sovereign function" and "sovereign necessity," *United States Postal Serv.* v. *Council of Greenburg Civic Ass'ns*, 453 U.S. 114, 121 (1981), and of providing for those services to be performed by the United States Government. See 39 U.S.C. 101(a) (Postal Service shall be operated as "a basic and fundamental service" that is "provided to the people by the Government of the United States"). Not surprisingly, aside from the decision below, no court has held that the Postal Service (or,

for that matter, any other component of the federal government) is subject to the antitrust laws.

In support of the Ninth Circuit's decision, respondents argue that constituent parts of the United States Government may be amenable to suit under the antitrust laws, even though the United States is not. They also argue that the Postal Service is sufficiently distinct from the United States to render it a "person" under the antitrust laws. Finally, they argue that the Postal Service's competitive services should be subject to antitrust liability. Each of those contentions is fundamentally flawed.

A. The Term "Person" Under The Antitrust Laws Does Not Include Agencies And Instrumentalities Of The United States

1. Respondents argue that this Court's holding in *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), that Congress did not intend the term "person" to include the United States is "narrowly" limited to "the United States itself" "as sovereign." Resp. Br. 8, 9, 12. Respondents reason that, because only the United States may sue as plaintiff to enforce the antitrust laws, see 15 U.S.C. 15a, and because, in their view, agencies, instrumentalities, and other components of the United States Government should be able to sue in their own name for injuries to their business or property, those federal entities must fall within the term "persons" that may sue as plaintiffs or be sued as defendants under the antitrust laws. Resp. Br. 9, 15-16. Respondents' contention fails on several levels.

Acceptance of respondents' contention that an agency, instrumentality, or other entity of the United States Government may be a "person" would create an antitrust cause of action against all federal agencies and instrumentalities simply by virtue of a sue-and-be-sued clause. That result would be contrary to *FDIC* v. *Meyer*, 510 U.S. 471, 483-484

(1994), which held that the waiver of sovereign immunity in a sue-and-be-sued clause is not sufficient to create substantive liability and a cause of action against a federal agency. See U.S. Br. 17-19. Respondents' logic would also create an antitrust cause of action against all federal *officials* who are authorized to be sued in carrying out specified public functions. *E.g.*, 12 U.S.C. 1702, 42 U.S.C. 1404a (authorizing Secretary of Housing and Urban Development to sue and be sued); 19 U.S.C. 1920, 2350 and 42 U.S.C. 3211 (same for Secretary of Commerce); 20 U.S.C. 1066d, 1082 (same for Secretary of Education); 42 U.S.C. 292j (same for Secretary of Health and Human Services).

Moreover, the assertion that Congress intended to subject federal entities to the antitrust laws cannot be reconciled with this Court's conclusion in *Cooper*, 312 U.S. at 607, that Congress "obvious[ly]" did not intend to embrace the United States within the term "person" that may sue as an antitrust plaintiff or is subject to antitrust suit as a defendant. The United States asserts its sovereign authority through many formally distinct federal entities. Given that practical reality, this Court's precedents have uniformly treated a legislative intent to exclude the sovereign from the term "person" as equally excluding the agencies and instrumentalities through which the sovereign acts. U.S. Br. 8-9.[1]

---

[1] Respondents and Amicus American Trucking Association (ATA) (Br. 14) err in assuming that injuries to the Postal Service and other federal entities cannot be vindicated under 15 U.S.C. 15a, which permits "the United States" to bring suits for treble damages for injury to "its business or property." Section 15a permits the United States to recover for its injuries when it acts (through any of its constituent parts) as a purchaser in the marketplace. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341-342 (1979); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263-264 (1972). Such injuries are necessarily sustained when federal entities purchase goods. See also H.R. Rep. No. 422, 84th Cong., 1st Sess. 1-5 (1955) (setting forth congressional intent to change the result reached in *Cooper* to authorize the

Respondents offer no basis for a different treatment with respect to the meaning of the term "person" under the federal antitrust laws. In passing those laws, Congress did not intend to regulate entities that Congress itself created under federal law as constituent parts of the United States Government. Thus, every lower court to consider the issue has held there is no substantive cause of action under the antitrust laws against agencies and instrumentalities of the United States. U.S. Br. 9-10.[2] Indeed, respondents have not cited a single decision since the passage of the Sherman Act in 1890 that holds that a federal agency, instrumentality, or comparable entity may be subject to antitrust liability. In the face of that consistent treatment of federal entities over the last century, Congress has declined to amend the antitrust laws to create a cause of action against the United States or any of its constituent parts.[3]

United States to recover damages for collusive prices paid in government procurement). In an analogous context, this Court has held that federal entities are part of the United States Government for purposes of the False Claims Act, and that the United States therefore may sue to recover for false claims submitted to such entities. *Rainwater* v. *United States*, 356 U.S. 590, 592 (1958) (Commodity Credit Corporation); *United States* v. *McNinch*, 356 U.S. 595, 598 (1958) (Federal Housing Administration). Antitrust injury, like loss from fraud, that is sustained by the Postal Service is paid by the public fisc. 39 U.S.C. 2001, 2003, 2008(c), 2401(a); see also 39 U.S.C. 409(d) (providing for representation of Postal Service by Department of Justice).

[2] Amicus ATA suggests (Br. 6 n.2), without citation to authority, that an exclusion of a federal entity from the term "person" would not insulate the entity from liability under Section 1 of the Sherman Act, 15 U.S.C. 1, which does not in terms limit its scope to "persons." The logic of that contention, however, would create a substantive cause of action against the United States, contrary to the Court's decision in *Cooper*.

[3] Before the District of Columbia Circuit held in *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243, 247 (1981), cert. denied, 455 U.S. 919 (1982), that federal instrumentalities are not subject to suit under the antitrust

2. Invoking a "presumption against implicit exemptions" from the antitrust laws (*e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787 (1975)), respondents also attempt to draw support from decisions holding that the term "person" includes other public entities, such as States, foreign governments, municipalities, and public railroads. Resp. Br. 9-12. Those decisions, however, do not cast doubt on Congress's specific intent to exclude the *United States Government* from the term "person." To the contrary, this Court's precedents recognize that Congress's application of the antitrust laws has varied according to the sovereign at issue.

---

laws, a district court had held that the Tennessee Valley Authority (TVA) is a person that may sue as an antitrust *plaintiff* because Congress created the TVA as a government "corporation." *United States* v. *General Elec. Co.*, 209 F. Supp. 197, 203 (E.D. Pa. 1962); see *In re Uranium Indus. Antitrust Litig.*, 458 F. Supp. 1223, 1227-1228 (J.P.M.L. 1978) (citing *General Elec. Co.* in holding that antitrust action brought by TVA was subject to transfer under 28 U.S.C. 1407). A subsequent district court, however, had accepted the contention of the TVA that, as a federal agency or instrumentality, it is *not* a person amenable to suit as an antitrust defendant. *Webster County Coal Corp.* v. *TVA*, 476 F. Supp. 529, 531-532 (W.D. Ky. 1979).

In 1978, the Department of Justice's Antitrust Division filed comments with the Postal Rate Commission concerning the implications for competition of the Postal Service's proposal to offer certain electronic mail transmission. In those comments, the Division suggested that some of the operations of the Postal Service might be found to be subject to the antitrust laws. Comments of the U.S. Dep't of Justice, *In re Electronic Mail Proposal, 1978* 20-35 (Postal Rate Comm'n Dec. 6, 1978) (No. MC78-3). Those comments did not discuss this Court's decision in *Cooper* and were made before the D.C. Circuit's decision in *Sea-Land* and other appellate decisions holding that agencies and instrumentalities of the United States are not subject to the antitrust laws. See U.S. Br. 9-10. To the extent that those comments expressed a view of the Department of Justice at the time that the Postal Service was subject to the antitrust laws, they no longer represent the position of the Department of Justice or the United States.

Thus, the Court has reaffirmed its holding in *Cooper* that the term "person" does not include the United States while at the same time holding that the term does include foreign governments, *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 316-318 (1978), and the States, *Georgia* v. *Evans*, 316 U.S. 159, 161-162 (1942). Cf. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978) (holding that Congress did not intend municipalities to share in antitrust exemption applicable to "State[] acts of government").

For similar reasons, respondents and their amici mistakenly rely on precedents addressing whether government corporations should be treated as the United States under certain statutes. Resp. Br. 13-15; ATA Am. Br. 9-12. In particular, respondents are wrong in asserting that the Postal Service is essentially a "corporation," governed by "a corporate charter," and run by a "corporate chief executive." Br. 22. Quite to the contrary, Congress specifically rejected proposals to create the Postal Service as a government corporation with a corporate charter and equity ownership interests. U.S. Br. 26. Against the backdrop of this Court's decision in *Cooper* holding the United States not to be a "person" under the antitrust laws, Congress created the Postal Service as part of the "Government of the United States," 39 U.S.C. 201, to be comprised of federal officers and employees who would carry forward this Nation's unbroken tradition of providing postal services as uniquely sovereign functions, regardless of profit. U.S. Br. 13-16.[4]

---

[4] See also 116 Cong. Rec. 19,847 (1970) (Rep. Henderson) ("[L]et me make it clear that in this bill * * * no postal corporation is formed. There is no new legal entity outside of the executive branch covering the employees, and the postal authority would retain civil service status like all other Federal employees."); *id.* at 19,854-19,855 (Rep. Button) ("I am proud that I stood firm, Mr. Chairman, against those who would have caused us to capitulate to the numerous undesirable aspects of the postal corporation."); *id.* at 22,053 (Sen. Fannin) ("[T]he Postal Service—even

The decisions cited by respondents and amici ATA *et al.* are inapposite, for none provides a basis for finding a congressional intent to create a cause of action against the United States Government or one of its constituent parts. Thus, *Pierce* v. *United States*, 314 U.S. 306 (1941), and *United States* v. *Strang*, 254 U.S. 491 (1921), addressed the question whether an employee of a government corporation or a corporation in which the United States was a stockholder was falsely acting as a government agent or officer within the meaning of a criminal prohibition. Furthermore, *Strang* and *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922), addressed under various statutes the status of the United States Shipping Board Emergency Fleet Corporation, which was "chartered under local laws and organized so that private parties could share stock ownership with the United States." *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958). Finally, *Arkansas* v. *Farm Credit Services*, 520 U.S. 821 (1997), held that Production Credit Associations (PCAs), whose entire stock "is owned by private entities," may not share in the judicially-created exception from the Tax Injunction Act, 28 U.S.C. 1341, for suits by the United States on behalf of its instrumentalities, because those corporations "do not have or exercise power analogous to that of the NLRB or any of the departments or regulatory agencies of the United States." 520 U.S. at 831-832.

---

after reorganization—is not going to be like the telephone company. * * * Its directors will * * * represent the public generally and will not be operating a business for profit."); *Hearings on H.R. 17070 and Similar Bills, Bills To Improve and Modernize the Postal Service, to Reorganize the Post Office Department, and for Other Purposes, Before the House Committee on Post Office & Civil Service*, 91st Cong. 2d Sess., Serial No. 91-22, 2 (1970) (Rep. Dulski) ("I am particularly pleased with the plan to keep the postal service as an agency of the Government, rather that convert it into a public corporation.").

Those decisions involved neither the antitrust laws, the meaning of the word "person" amenable to suit, nor the status of the Postal Service. They accordingly furnish no basis for an antitrust cause of action against the Postal Service.

B. The Postal Service Is Part Of The United States Government And Therefore Not Subject To Suit Under The Antitrust Laws

1. Respondents do not dispute that the Cabinet-level Post Office Department as it existed from 1872 until 1970 was not a "person" subject to the antitrust laws under this Court's decision in *Cooper* or that its successor, the Postal Service, was likewise established as part of the United States Government. It follows that the Postal Service too is not such a "person," for respondents fail to point to *any* expression (much less a clear expression) of congressional intent in the Postal Reorganization Act (PRA) to render the Postal Service subject to the antitrust laws *notwithstanding* its status as a component of the United States Government. U.S. Br. 11-13; see *Silver* v. *United States Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991) ("Up until its reorganization in 1970, the Post Office Department was in fact a Cabinet-level department. * * * The PRA did not * * * fundamentally change the nature and purpose of the Postal Service.").

Respondents seize on four aspects of the PRA that, in their view, render the Postal Service liable under the antitrust laws: (a) its creation as an "independent establishment" (39 U.S.C. 201); (b) its authority to engage in non-postal and competitive operations (39 U.S.C. 404(a)(6)); (c) the exemption of the Postal Service from certain laws applicable to other government agencies (39 U.S.C. 410); and (d) the sue-and-be-sued clause (39 U.S.C. 401(1)). None of those statutory features, however, alters the fundamental

fact that the Postal Service is part of the United States Government, as confirmed by numerous explicit provisions in the PRA that designate and treat the Postal Service as a federal sovereign entity. U.S. Br. 13-16. Nor do those features remotely indicate a congressional intent to impose antitrust liability on the Postal Service.

a. Respondents and their amici place heavy reliance on the Postal Service's status as an "*independent* establishment." 39 U.S.C. 201 (emphasis added). See Resp. Br. 18-21. That argument, however, confuses a federal establishment's independence from partisan controls with a congressional intent to render the establishment a private entity. Section 201 by its express terms designates the Postal Service as an "independent establishment *of the executive branch of the Government of the United States*." 39 U.S.C. 201 (emphasis added). Congress in the PRA likewise made explicit its intent that postal services would be provided "by the *Government of the United States*." 39 U.S.C. 101(a) (emphasis added). The holding in *Cooper* that the antitrust laws do not apply to the United States Government is therefore controlling here. By contrast, where Congress has intended an entity that it creates *not* to be part of the United States Government for purposes of imposing statutory liability, it has done so in unmistakable terms by providing that an entity is not an agency or establishment of the United States. U.S. Br. 16, 21 & n.7.

Congress did not confer independence on the Postal Service in order to render it a private entity. Rather, Congress wanted to free the Service from the congressional micro-management and partisan influences that had historically impinged on the Service's ability to perform its sovereign functions in a sound manner. U.S. Br. 12-13, 25-26. Thus, when the Postal Service was created, President Nixon explained that it would be an entity like "such presently existing independent establishments as the Board of Gov-

ernors of the Federal Reserve System, the Securities and Exchange Commission, and the National Aeronautics and Space Administration," H.R. Doc. No. 313, 91st Cong., 2d Sess. 2 (1970), none of which is subject to the antitrust laws. See also 116 Cong. Rec. 19,845 (1970) (Rep. Dulski) ("The Post Office Department is replaced by a non-Cabinet independent Government agency—the U.S. Postal Service.").

It is also irrelevant that, as respondents observe (Br. 20), Congress gave the Postal Service the power to enter into contracts, 39 U.S.C. 401(3), to keep its own accounting records, 39 U.S.C. 401(4), and to operate and maintain property, 39 U.S.C. 401(6). Congress has granted similar powers to other paradigmatically federal agencies, such as the Department of Education. 20 U.S.C. 3475 (contracts), 3477 (acquisition and maintenance of property); see also 5 U.S.C. 301 ("The head of an Executive department * * * may prescribe regulations for * * * the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.").

Respondents further err in relying on Congress's designation of the Postal Service as an "establishment" (39 U.S.C. 201) of the United States, rather than as an "agency" or "instrumentality" of the United States. Resp. Br. 18. Congress created many quintessentially federal entities as "establishments." *E.g.*, 5 U.S.C. 1101 (Office of Personnel Management); 42 U.S.C. 2286 (Defense Nuclear Facilities Safety Board); 49 U.S.C. 1111 (National Transportation Safety Board); 39 U.S.C. 3601 (Postal Rate Commission); 49 U.S.C. 10301 (1994) (repealed 1995) (Interstate Commerce Commission).[5] For similar reasons, respondents mistakenly rely (Br.

---

[5] Pursuant to 5 U.S.C. 903 and 906, Executive Orders have designated other federal entities as independent establishments. *E.g.*, Reorg. Plan No. 3 of 1978, 3 C.F.R. 329 (1979), *reprinted in* 5 U.S.C. App. at 212 (Federal Emergency Management Agency); Reorg. Plan No. 2 of 1978,

19 n.8) on the exclusion of the Postal Service from the definition of executive departments and agencies for purposes of Title 5 of the United States Code. "The mere fact that the Postal Service is not designated a department * * * does not mean it is not a part of the executive branch. * * * Congress could not have made its intent more clear [in 39 U.S.C. 101(a) and 201] that the Postal Service was to remain a part of the U.S. Government and to perform executive branch functions within that government." *Silver*, 951 F.2d at 1035.[6]

b. Respondents also rely on the fact that the Postal Service, pursuant to its authority under 39 U.S.C. 404(a)(6), engages in "nonpostal or similar services," such as selling greeting cards and on-line billing services. Resp. Br. 22-24, 33-34. A federal entity's commercial endeavors, however, do not change the fact that the entity is performing a sovereign function. This Court's "decisions have made it clear that the Federal Government performs no 'proprietary' functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed." *Federal Land Bank* v. *Board of County Commn'rs*, 368 U.S. 146, 150-151 (1961); see also *Federal Land Bank* v. *Bismarck Lumber Co.*, 314

---

§ 301, 3 C.F.R. 327 (1979), *reprinted in* 5 U.S.C. App. at 208 (1978) (Federal Labor Relations Authority).

[6] Amicus Center for the Advancement of Capitalism argues (Br. 5-8) that the Postal Service is unconstitutionally structured because the appointment of the Postmaster General by the nine Presidentially-appointed Governors (39 U.S.C. 202(a) and (c)) violates the Appointments Clause, U.S. Const. Art II, § 2, Cl. 2, because the Postmaster General, in amicus's view, is a superior officer who must be appointed by the President. The only court to consider that contention, however, has specifically rejected it on the ground that the Governors are the heads of the Postal Service in whom Congress has vested authority to appoint and remove inferior officers such as the Postmaster General. *Silver*, 951 F.2d at 1038-1040.

U.S. 95, 102 (1941) ("The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental.").

That principle fully applies to the Postal Service. For well over a century, postal operations have "compete[d] with private businesses." *Emergency Fleet Corp., U.S. Shipping Bd.* v. *Western Union Tel. Co.*, 275 U.S. 415, 425 (1928). "The post office has since 1872 competed with bankers through money orders; since 1910 with savings banks by receiving deposits on interest; since 1913 with express companies through the parcel post." *Ibid.* The PRA, in Section 404(a)(6), simply gives the Postal Service the discretion to carry forward that tradition. In short, the fact that the Postal Service may "operat[e] alongside private companies" is not a basis for judicially inferring that Congress intended to create antitrust liability against the federal government. *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243, 247 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982).

c. Respondents also rely (Br. 24-26) on 39 U.S.C. 410(a), which provides that "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds * * * shall apply to the exercise of the powers of the Postal Service," except as otherwise provided in Section 410(b). That provision too, however, does not alter the status of the Postal Service as part of the United States Government. To the contrary, the very fact that Congress passed Section 410 to exempt the Postal Service from certain laws that otherwise apply to federal agencies confirms Congress's intent to create the Postal Service as an arm of the United States.

Section 410 furthers Congress's intent to permit the Postal Service to operate more efficiently by rendering inapplicable laws and regulations that apply to other government agencies, such as the Administrative Procedure Act (APA)

and the Federal Acquisition Regulations (FAR). See also 116 Cong. Rec. 27,607 (1970) (Rep. Udall) ("[W]e wanted to make sure that regulations—other than those adopted by the Postal Service itself—would not apply to the Postal Service by inadvertence."); *Butz Eng'g Corp.* v. *United States*, 499 F.2d 619, 626 (Ct. Cl. 1974). Congress elsewhere has exempted certain federal agencies from government-wide rules. *E.g.*, 31 U.S.C. 5136 (exempting Mint operations within the Department of Treasury from procurement and public contracts laws); 49 U.S.C. 40110(d)(2) (exempting the Federal Aviation Administration from certain federal acquisition laws, including the FAR). It would be quite ironic if a provision that excepts the Postal Service from liability under federal laws unless *expressly* provided by Congress could be a basis for judicially *inferring* a cause of action against the Postal Service that would impose new liability on the government and intrusion into the Postal Service's operations.

d. Respondents also reiterate (Br. 26-34) the Ninth Circuit's reliance on the sue-and-be-sued clause in 39 U.S.C. 401(1) and argue that a waiver of sovereign immunity renders the federal entity subject to a "generally applicable cause of action." Resp. Br. 32. As respondents elsewhere recognize, however, "[i]f there is no applicable cause of action, as in *Meyer*, then no liability should lie." *Id.* at 33. There is no antitrust cause of action against federal entities such as the Postal Service. Indeed, the sue-and-be-sued clause confirms the federally sovereign status of the Postal Service and cannot be a basis for subjecting it to a cause of action that is inapplicable to the federal sovereign. U.S. Br. 17-22.

For similar reasons, respondents err in relying on *Loeffler* v. *Frank*, 486 U.S. 549 (1988), and *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512 (1984). Those decisions concern the scope of the waiver of sovereign immu-

nity in instances where a cause of action otherwise exists against the Postal Service. U.S. Br. 22-24. The same is true with respect to other decisions cited by respondents and their amici. Resp. Br. 13-15; Washington Legal Foundation Am. Br. 9, 15, 17. Thus, in *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 388-394 (1939), the Court held that Congress had waived sovereign immunity for a government corporation, the Reconstruction Finance Corporation (RFC), and, in *Reconstruction Finance Corp.* v. *J.G. Menihan Corp.*, 312 U.S. 81, 83 (1941), the Court construed the RFC's sue-and-be-sued clause to render the corporation subject to the "ordinary incident of unsuccessful litigation in being liable for the costs which might properly be awarded against a private party in a similar case." Similarly, *Bank of the United States* v. *Planters' Bank*, 22 U.S. (9 Wheat.) 904, 908 (1824), held that an incorporated bank of which the State was one member was not entitled to the State's sovereign immunity under the Eleventh Amendment, because the State "acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation." None of those decisions holds or suggests that a waiver of sovereign immunity in a sue-and-be-sued clause in an Act of Congress can be a basis for independently creating a cause of action against a federal entity such as the Postal Service. And such a principle would conflict with this Court's subsequent decision in *FDIC* v. *Meyer*, 510 U.S. at 484.[7]

---

[7] *Pennsylvania Department of Environmental Resources* v. *United States Postal Service*, 13 F.3d 62, 65 (3d Cir. 1993), relied upon by respondents (Br. 34 n.19), simply held that the Postal Service was liable for civil penalties under 33 U.S.C. 1323, which expressly makes certain state environmental laws applicable to "[e]ach department, agency, or instrumentality of the executive, legislative, and judicial branch of the Federal Government."). Respondents also mistakenly rely (Br. 33 n.18) on the Federal Communication Commission's conclusion in *In re Graphnet Systems, Inc.*, 73 F.C.C.2d 283 (1979), vacated as moot *sub nom.*, *United States Postal*

2. Respondents also rely (Br. 20-21, 23, 29-30) on instances in which the Postal Service, in their view, is treated as if the Postal Service were not the United States. None of those distinct contexts, however, supports the conclusion that the Postal Service is subject to antitrust liability.

Respondents observe (Br. 21) that the Postal Service has sought copyright protection for works of its employees notwithstanding that 17 U.S.C. 105 provides that "[c]opyright protection is not available for any work of the United States Government." The Postal Service has not sought protections under the copyright laws, however, because it views itself as a non-United States entity. Rather, the Postal Service has relied upon Congress's specifically expressed intent that, "[i]n accordance with the objectives of the Postal Reorganization Act of 1970," 17 U.S.C. 105 would "not apply to works created by employees of the United States Postal Service," so that the Postal Service could "use the copyright law to prevent the reproduction of postage stamp designs for private or commercial non-postal services." H.R. Rep. No. 1476, 94th Cong., 2d. Sess. 60 (1976) (excerpted in 17 U.S.C. 105 note). Nothing concerning that interpretation of copyright law—for the protection of the Postal Service—contradicts Congress's insistence that the Postal Service remain a part of the United States Government or alters the established exemption of such federal entities from the antitrust laws.

Similarly inapposite are lower court decisions holding that the Postal Service's sue-and-be-sued clause rendered it a "person" under the Lanham Act. *Federal Express Corp.* v. *United States Postal Serv.*, 151 F.3d 536 (6th Cir. 1998);

Service v. *FCC*, No. 79-2243 (D.C. Cir. Oct. 14, 1980) (per curiam), that the Postal Service was a "person" subject to regulation under 47 U.S.C. 153(i) (1976). That vacated FCC decision was never subjected to judicial review.

Global Mail Ltd. v. *United States Postal Serv.*, 142 F.3d 208, 216-217 (4th Cir. 1998); *United States* v. *Q Int'l Courier, Inc.* 131 F.3d 770, 775 (8th Cir. 1997). Those cases construed an earlier version of the Lanham Act, 15 U.S.C. 1127, that had defined "person" to include an "organization capable of suing and being sued in a court of law." By contrast, the antitrust laws have never defined the term "person" by reference to whether an entity may sue or be sued. Thus, the United States is not a "person" under the antitrust laws even though "[t]he United States is a juristic person in the sense that it has capacity *to sue*." *Cooper*, 312 U.S. at 604 (emphasis added). The antitrust laws likewise exclude the United States and its agencies and instrumentalities from their coverage, even where such entities have the capacity *to be sued*.

Respondents also mistakenly rely (Br. 21) on the view expressed by a Postal Service official in 1971 that securities issued by the Postal Service were exempted securities under the Securities and Exchange Act because they were issued by a "person controlled or supervised by and acting as an instrumentality of the Government of the United States." 15 U.S.C. 77c(a)(2). The official simply argued that the Postal Service fell within the Act's definition of "person" that included "any unincorporated organization, or a *government* or political subdivision thereof," because, as a sovereign entity, the Postal Service "act[s] as an instrumentality of the Government of the United States." United States Postal Serv. (USPS No-Action Letter), 1971 WL 6571, *2 (Sept. 27, 1971) (quoting 15 U.S.C. 77b(a)(2) and 77c(a)(2)) (emphasis added). That view is fully consistent with the conclusion that the Postal Service is not a "person" under the

antitrust laws because the antitrust laws *exclude* the federal government and its agencies and instrumentalities.[8]

Equally unpersuasive is the heavy reliance by respondent and its amicus ATA on one district court decision, *United States* v. *American Tel. & Tel. Co.*, 461 F. Supp. 1314 (D.D.C. 1978), which found that the Postal Service did not have to respond to a discovery request for the production of documents in an antitrust suit brought by the United States. Resp. Br. 20-21; ATA Am. Br. 3, 15, 24. That decision merely held that the discovery request did not extend to documents "in the possession of the Federal Communications Commission and other independent regulatory agencies," including the Federal Trade Commission, the Federal Power Commission, as well as the Postal Service, which the court found to be similarly independent of the Department of Justice and the President's control over executive agencies. 461 F. Supp. at 1335-1336 n.65. That decision does not remotely suggest that Congress intended to apply the antitrust laws to the Postal Service and other federal agencies that enjoy some measure of independence from Presidential control.

C. Respondents' Policy Arguments Are Without Merit

1. Respondents argue that the creation of an antitrust cause of action against the Postal Service would, under the

---

[8] Respondents observe (Br. 23) that the Postal Service in 1971 made an alternative argument to the SEC that, although the Service was not "technically" a corporation, its securities were exempt because they should be treated *as if* issued by a "corporation[] in which the United States has a direct or indirect interest." USPS No-Action Letter, *supra*, at *3 (quoting 15 U.S.C. 78c(a)(12) (1970)); see 36 Fed. Reg. 21,365 (1971) (designation of exempt securities by Department of Treasury). The SEC did not address that contention, but rather accepted the Postal Service's primary contention that the securities at issue would be exempt under 15 U.S.C. 77c(a)(2). USPS No-Action Letter, *supra*, at *4.

Ninth Circuit's "'conduct-based' immunity" doctrine (see Pet. App. 13a), impose liability on the Postal Service for only "acts unconnected to the legislative will that are anti-competitive." Resp. Br. 35. Respondents rely on the principle that a person is shielded from antitrust liability if the action "derive[s] its authority and its efficacy from the legislative command of the state." *Id.* at 36 (quoting *Parker* v. *Brown*, 317 U.S. 341, 350 (1943)).

A "conduct-based immunity" doctrine, however, is out of place for a *federal* entity like the Postal Service that Congress itself created as part of the Executive Branch to take all appropriate action in furtherance of its sovereign powers and functions. U.S. Br. 28-31. Unlike other governmental bodies and private entities, Congress did not intend to subject entities that Congress itself created as part of the federal government to any form of liability under the antitrust laws.

Respondents offer no coherent basis for determining which actions of the Postal Service fail to "carry[] out its legislative mandate" and therefore are "unconnected to the legislative will." Resp. Br. 35, 37. This suit proves the point. Respondents contend that the routine procurement of mail sacks at issue here is subject to antitrust scrutiny because "Congress has not determined that monopolistic procurement practices are vital to any congressional goal." Br. 35 n.21. As a federal agency, however, *all* actions of the Postal Service, including its procurement purchases, are presumptively connected to the command and direction of Congress. Indeed, nearly all governmental agencies engage in commercial procurements of some kind.

Also lacking in principle is respondents' argument that the antitrust laws should extend to all "commercial actions unconnected to the legislative monopoly." Resp. Br. 37. In terms of *specific congressional authorization*, there is no distinction whatsoever between the Postal Service's exclu-

sive or "monopoly" rights with respect to the delivery of letters, 39 U.S.C. 601-606 and 18 U.S.C. 1693-1699, and its congressionally-imposed obligation to provide universal *parcel* and *express* mail services, 39 U.S.C. 403 and 3623(d), notwithstanding the presence of competition in those services from private entities.

The same congressional authorization also covers the Postal Service's *nonpostal* activities. Far from being "unconnected to the legislative will," Congress conferred on the Postal Service the specific power "to provide, establish, change, or abolish special nonpostal or similar services" (39 U.S.C. 404(a)(6)), and Congress did so in the same section of Title 39 in which it conferred on the Postal Service the power to engage in postal services such as mail delivery and postal stamp sales, 39 U.S.C. 404(a)(1) and (4). Finally, it would make no sense to apply a conduct-based immunity doctrine based on whether Congress required the particular action at issue. Such a rule would conflict with Congress's specific intent in the PRA to eschew micro-management of the Postal Service's operations. U.S. Br. 30-31.

2. Respondents also argue (Br. 42) that the imposition of antitrust liability on the Postal Service would be consistent with the Postal Service's recent expression of support for a bill that would have made it a "person" subject to suit under the antitrust laws. See H.R. 4970, 107th Cong., 2d Sess. § 304 (2002). The support of the Postal Service, however, was directed at the bill as a whole, which would have radically restructured the Postal Service's operations, including giving the "organization pricing flexibility it desperately needs." United States Postal Serv., *Postal Service Board of Governors Announces Support for Postal Reform Legislation*, *Postal News Release No. 02-048* (June 4, 2002) <http:

//www.usps.com/news/2002/press/pr02_048.htm>. That bill, moreover, was never acted on by Congress.[9]

From the outset, the United States Government has engaged in postal operations free of any antitrust constraints. It is the role of Congress to make the fundamental policy decision whether now to change course and to impose a potentially enormous and unprecedented liability on the Postal Service by subjecting it to the antitrust laws.

* * * * *

For the foregoing reasons and those stated in our opening brief, the court of appeals' decision should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

OCTOBER 2003

[9] Congress likewise failed to pass a similar bill in 1999 that would have made the Postal Service a "person" under the antitrust laws. H.R. 22, 106th Cong., 1st Sess. § 307 (1999).